



238  
No. —

In the Supreme Court of the United States

OCTOBER TERM, 1941

IN THE MATTER OF INDEPENDENT AUTOMOBILE  
FORWARDING CORPORATION, BANKRUPT

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT

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(I)



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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on April 12, 1941.

OPINIONS BELOW

The second opinion of the District Court for the Western District of New York (R. 13-18) is unreported. The first opinion of that court is reported in 28 F. Supp. 428. The opinion of the Circuit Court of Appeals (R. 25-30) is reported in 118 F. (2d) 537.

**JURISDICTION**

The judgment of the court below was entered April 12, 1941 (R. 31). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether the liability of an employer under Section 802 of the Social Security Act to pay the tax levied upon the income of an employee under Section 801 of that Act is a tax liability entitled to priority of payment in bankruptcy within the meaning of Section 64 (a) (4) of the Bankruptcy Act.

**STATUTES INVOLVED**

The applicable statutes are set forth in the Appendix, *infra*, pp. 7-8.

**STATEMENT**

The Independent Automobile Forwarding Corporation was adjudicated a bankrupt in the District Court for the Western District of New York on April 26, 1938 (R. 1). The liquidation of the property in the bankruptcy proceedings brought into the hands of the trustee assets of \$3,053.20, which were insufficient to pay in full the claims filed and allowed priority under Section 64 of the Bankruptcy Act, *infra* (R. 5, 7-8, 13). The trustee accordingly filed a petition requesting directions from the court as to the order

of priority of the various priority claims (R. 6-9). Priority claims of the United States and of the State of New York are so large as to absorb the entire amount remaining in the hands of the trustee, irrespective of the outcome of this litigation (R. 13); accordingly, they are the only parties in interest in the proceeding.

Among the claims of the United States is one for taxes under Title VIII of the Social Security Act. The State of New York contends that this claim is not entitled to priority under Section 64 (a) (4) of the Bankruptcy Act as a claim for taxes, on the ground that Title VIII imposes a tax on employees rather than on the employer, and that the liability imposed upon the employer to deduct the amount of the tax from the wages of the employees and to pay the tax is a debt rather than a tax liability.

The District Court held that the claim is entitled to priority as a tax claim (R. 17-18) and entered an appropriate order of distribution (R. 4-6). The court below reversed, holding that the claim is not entitled to priority as a tax claim (R. 27).

#### **SPECIFICATION OF ERRORS TO BE URGED**

The court below erred:

1. In refusing to allow the claim of the United States for taxes levied under Title VIII of the Social Security Act as a claim for taxes legally

due and owing by the bankrupt to the United States within the meaning of Section 64 (a) (4) of the Bankruptcy Act.

2. In reversing the judgment of the District Court for the Western District of New York granting priority in payment of the claim of the United States for taxes under Title VIII of the Social Security Act.

#### **ARGUMENT**

1. The decision below is in probable conflict with the decision of this Court in *City of New York v. Feiring*, No. 863, October Term, 1940, decided May 26, 1941. The conflict is emphasized by the fact that the court below relied as authority for its ruling in this case (R. 27) upon its own earlier decision in the *Feiring* case (118 F. (2d) 329) which this Court subsequently reversed.

In the *Feiring* case, this Court held that a claim for the New York City sales tax against a bankrupt vendor of personal property is entitled to priority under Section 64 (a) (4) of the Bankruptcy Act. The tax statute there involved, as the opinion points out, imposed a tax upon receipts from retail sales of tangible personal property and required the seller to charge the buyer with the amount of the tax separately from the sales price, and to collect the tax from him. The statute further required the seller to file a return

with the City Comptroller, showing his receipts and the tax payable thereon; at the time of filing the return the seller was required to pay the Comptroller the amount of tax due. This Court held that the liability of the seller was a tax liability, despite the fact that the statute enabled him to shift the tax burden to the purchaser and made the purchaser liable as a taxpayer. The opinion states that the liability of the vendor is a "pecuniary burden \* \* \* laid upon the \* \* \* seller, for the support of government, and without his consent"; it concludes that such a pecuniary burden "has all the characteristics of a tax entitled to priority of payment in bankruptcy within the meaning of § 64 of the Bankruptcy Act." See also *New Jersey v. Anderson*, 203 U. S. 483, 491.

The burden imposed upon employers by Title VIII of the Social Security Act bears a close analogy to the burden imposed upon vendors by the New York City sales tax. The employer is required by Section 802 (a) of the Social Security Act, *infra*, p. 7, to collect the tax from the employees, just as the vendor in New York City is required to collect the tax from the purchasers by billing them separately for the amount of the tax. But the employer, like the vendor, is made liable for the payment of the tax himself, irrespective of whether he has collected it from his employees. This liability, in the words of this

Court's opinion in the *Feiring* case, quoted above, is a "pecuniary burden \* \* \* laid upon the \* \* \* [employer] for the support of government, and without his consent"; under the ruling in the *Feiring* case, such a liability is a tax liability within the meaning of Section 64 (a) (4) of the Bankruptcy Act.

2. The question presented in this case is of substantial fiscal and administrative importance. We are advised by the Bureau of Internal Revenue that there are probably more than 1,000 pending bankruptcy cases which involve claims against a bankrupt employer for taxes under Title VIII of the Social Security Act. In view of this circumstance, and of the fact that the problem will constantly recur, an authoritative decision by this Court is desirable.

#### CONCLUSION

It is therefore respectively submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,  
Acting Solicitor General.

JULY 1941.

## APPENDIX

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544, as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840:

SEC. 64. *Debts which have priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be \* \* \* (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: \* \* \*

Social Security Act, c. 531, 49 Stat. 620, Title VIII:

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

SEC. 807. (c) All provisions of law  
\* \* \* applicable with respect to any  
tax \* \* \* and the provisions of sec-  
tion 607 of the Revenue Act of 1934, shall,  
insofar as applicable and not inconsistent  
with the provisions of this title, be ap-  
plicable with respect to the taxes imposed  
by this title.

Revenue Act of 1934, c. 277, 48 Stat. 680:

**SEC. 607. ENFORCEMENT OF LIABILITY FOR  
TAXES COLLECTED.**

Whenever any person is required to col-  
lect or withhold any internal-revenue tax  
from any other person and to pay such tax  
over to the United States, the amount of  
tax so collected or withheld shall be held  
to be a special fund in trust for the United  
States. The amount of such fund shall be  
assessed, collected, and paid in the same  
manner and subject to the same provisions  
and limitations (including penalties) as are  
applicable with respect to the taxes from  
which such fund arose. (U. S. C., Title  
26, Sec. 1551.)